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No. 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

THE MOTORLEASE CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 685

THE MOTORLEASE CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In our petition for a writ of certiorari, filed on November 13, 1964, we referred (Pet. 22) to cases then pending in other Circuits which presented the same issue as that involved in this case. Among them was *United States* v. *S & A Company*, pending in the United States Court of Appeals for the Eighth Circuit. The purpose of this supplemental memorandum is to advise the Court that on November 27, 1964, the Eighth Circuit decided the *S & A Company* case in favor of the taxpayer, in a decision in direct conflict with the decision of the court below in this case. The Eighth

Circuit's opinion, together with the dissenting opinion of Judge Van Oosterhout, is set forth in full in the Appendix (pp. 1a-32a) to the Supplemental Memorandum in Support of Petition for a Writ of Certiorari in *Fribourg Navigation Company, Inc.* v. *Commissioner*, No. 679, this Term, filed in this Court on December 8, 1964.

In the *S & A Company* case, the taxpayer, engaged in the business of manufacturing and marketing outboard motors, sold all of its operating assets at a price exceeding not only their adjusted basis at the beginning of the year of sale, but also their original cost. The question in the case was whether the taxpayer was "entitled to any deduction for depreciation on the sale assets in the sale year" (Supp. Mem. in *Fribourg,* No. 679, p. 1a). The reasonableness of the amount of depreciation claimed, if allowable at all, was, as in this case, not in dispute. *Id.* at 5a.

The Eighth Circuit held that the claimed depreciation deduction was properly allowable under section 167 of the Internal Revenue Code of 1954 and the regulations thereunder. The court held that, where the estimates of useful life and salvage value are reasonable and unchallenged, a sale at a price exceeding book value at the beginning of the year-of-sale does not require disallowance of the depreciation deduction for the year-of-sale. In so holding, the court stated (Supp. Mem. in *Fribourg*, No. 679, p. 24a): "There is no absolute identity of salvage value with sales price. The one is not necessarily equivalent to the other. Neither the statute nor the regulations equate them or make an exception out of the sale year. The emphasis, as has been noted, is, instead, on the estimate of

salvage value, on such estimate at acquisition, or (sic) redetermination as the exception, on the distinct possibility of gain or loss on disposition, and on divorcement of salvage value from price level fluctuations."

Although the court expressed "deep respect for the conclusions reached by the Second Circuit majorities in *Fribourg* and *Motorlease*" (Supp. Mem. in *Fribourg*, No. 679, p. 29a), it refused to follow those decisions disallowing the claimed deductions for the year of sale.[1] Judge Van Oosterhout stated, in his dissent, that he agreed with the interpretation of the statute and regulations made by the Second Circuit in the *Fribourg* and *Motorlease* cases, and that he "would reverse upon the basis of the majority opinions in such cases" (Supp. Mem. in *Fribourg*, No. 679, p. 32a).

The decision of the Eighth Circuit in the *S & A Company* case is in direct conflict with the ruling of the court below that a taxpayer may not "take a depreciation deduction for the year of sale of a depreci-

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[1] The Eighth Circuit noted that the sale involved was "an unanticipated sale in midlife", rather than "at or near the very end of useful life in the taxpayer's hands". In the latter case, the court observed, "there *may* be justification in a given case for the disallowance of final year depreciation, "although this would require "something more than the mere happenstance of a favorable sale price". (Supp. Mem. in *Fribourg*, No. 679, p. 26a). Emphasis Added. While we do not concede the validity of the distinction based on the time of disposal, it is clear that the court was not attempting to distinguish the case before it on the one hand from *Motorlease* and *Fribourg* on the other, or to draw any distinction between *Motorlease* and *Fribourg* themselves. The court noted that "It does not follow * * * that a favorable sale at the end of useful life compels a depreciation disallowance in all cases" (Ibid.), and the *Fribourg* and *Motorlease* decisions were treated together throughout the Eighth Circuit opinion. See Supp. Mem. in *Fribourg*, No. 679, pp. 2a, 13a-14a, 15a, 27a, 29a, 30a.

able asset in excess of the amount by which the adjusted basis of the asset at the beginning of the year of sale exceeds the amount realized upon the sale" (Petition for Writ of Certiorari in this case, Appendix A, p. 1a).[2] We respectfully submit that the petition for a writ of certiorari should be granted, not only for the reasons already set forth in our petition, but also to resolve this conflict of decisions between the Second and Eighth Circuits.

Respectfully submitted,

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[2] Since the filing of the petition in this case, there have also been two additional decisions allowing, contrary to the decision below, a depreciation deduction in the year of sale of assets at a gain. *Occidental Loan Co.* v. *United States*, 14 AFTR 2d 5911 (S.D. Cal., Nov. 13, 1964); *Holder Drive-Ur-Self, Inc.* v. *Commissioner*, 43 T.C. No. 19, Nov. 20, 1964.